

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of October, two thousand nine.

Present:

JON O. NEWMAN,
JOHN M. WALKER, JR.,
ROBERT A. KATZMANN,
Circuit Judges.

PAULINA DeMARCO,

Plaintiff-Appellant,

v.

No. 08-4638-cv

STONY BROOK CLINICAL PRACTICE MANAGEMENT PLAN AND RESEARCH
FOUNDATION OF THE STATE UNIVERSITY OF NEW YORK,

Defendants-Appellees.

For Plaintiff-Appellant:

DOUGLAS H. WIGDOR (Christopher Q. Davis, *on the brief*), Thompson, Wigdor & Gilly, LLP, New York, NY

For Defendant-Appellee Stony Brook
Clinical Practice Management Plan:

LEONARD M. ROSENBERG (Lauren M. Levine and Wilhelmina A. de Harder, *on the brief*), Garfunkel, Wild & Travis, P.C., Great Neck, NY

For Defendant-Appellee Research Foundation
of the State University of New York:

WILLIAM G. BALLAINE (Rebecca W. Embry and Marka Belinfanti, *on the brief*), Landman Corsi Ballaine & Ford P.C., New York, NY

For Amicus Curiae
Equal Employment Opportunity Commission:

Paul D. Ramshaw, Attorney, (Ronald S. Cooper, General Counsel, Carolyn L. Wheeler, Acting Associate General Counsel, and Vincent J. Blackwood, Assistant General Counsel, *on the brief*), Office of General Counsel, Equal Opportunity Commission, Washington DC

Appeal from the United States District Court for the Eastern District of New York (Gleeson, *J.*).

UPON DUE CONSIDERATION of the appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, *J.*), it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court is **VACATED** and the case is **REMANDED**.

Plaintiff-Appellant Paulina DeMarco appeals from a judgment of the United States District Court for the Eastern District of New York (Gleeson, *J.*) granting summary judgment to Defendants-Appellees and dismissing DeMarco's claims. DeMarco alleged that defendants discriminated against her on the basis of her sex and pregnancy when Defendant Stony Brook

Clinical Practice and Management Plan (“CPMP”) decided not to hire her. She alleged also that defendants failed to hire her in retaliation for engaging in the protected activity of filing an employment discrimination lawsuit against her former employer. We assume the parties’ familiarity with the facts, procedural history, and scope of the issues presented on appeal.

Both DeMarco’s discrimination and retaliation claims are analyzed using the burden-shifting paradigm articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996) (retaliation claims); *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995) (pregnancy discrimination claims).

With regard to plaintiff’s pregnancy discrimination claim, the district court concluded that DeMarco was not qualified for the data analyst position because she had intentionally deceived CPMP regarding her recent employment history; the district court concluded therefore that DeMarco failed to make out a prima facie case of discrimination. We find sufficient evidence in the record for the question of DeMarco’s qualification to be submitted to a jury. Even if the undisputed facts indicate that DeMarco intentionally deceived CPMP, it does not necessarily follow that she is not qualified for the position, *see Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 172 (2d Cir. 2006) (noting that even if an employer could legitimately determine that the employee’s conduct was unacceptable, “these considerations go to the employer’s ability to rebut a prima facie case . . . , not to the showing of the prima facie case itself.”); DeMarco might nonetheless “possess[] the basic skills necessary for performance of the job.” *Id.* at 171. Summary judgment on this ground was therefore inappropriate.

Because the evidence in the record could support a jury’s finding that DeMarco had established a prima facie case of discrimination, and the district court properly determined that DeMarco made out a prima facie case of retaliation, the burden shifts to CPMP to provide a

lawful reason for its decision not to hire DeMarco. CPMP has discharged this burden by asserting that it did not hire DeMarco based on her conduct during the application process. Thus, to avoid summary judgment, DeMarco must adduce evidence that could support a jury's finding that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext." *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 143 (2000). *Accord Holcomb v. Iona Coll.*, 521 F.3d 130, 141 (2d Cir. 2008) (discrimination); *Reed*, 95 F.3d at 1181 (retaliation).

Drawing all reasonable inferences in DeMarco's favor, the evidence could support a jury's conclusion that CPMP decided not to hire her either because of her pregnancy or because of her lawsuit. Specifically, this conclusion could be based on the evidence (1) that Research Foundation's Assistant Vice President for Human Resources suggested that CPMP could employ DeMarco as a data analyst briefly, despite knowing of her alleged dishonesty; (2) that Darren Mikalsen, one of the supervisors for the data analyst position, upon learning of DeMarco's prior employment, told DeMarco that it would not be a problem; and (3) that CPMP back-dated documents indicating that DeMarco had poor references. Thus, summary judgment was not appropriate.

Accordingly, for the foregoing reasons, the judgment of the district court is **VACATED** and the case is **REMANDED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: _____